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No. 91-1422

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

S. PAUL HOBBS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 309(a) of the Clean Water Act, 33 U.S.C. 1319(a), authorizes the Environmental Protection Agency to bring an enforcement action against persons who discharge pollutants into wetlands without applying to the Corps of Engineers for a permit.

2. Whether the jury correctly determined that petitioners' property was a wetland that was adjacent to waters of the United States for purposes of regulations implementing the Clean Water Act.

3. Whether the regulatory definition of wetlands "adjacent" to waters of the United States is unconstitutionally vague.

4. Whether the district court's refusal to allow petitioners to present evidence that they acted in good faith violated the Fifth or Seventh Amendments.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Avoyelles Sportsmen's League, Inc. v. *Marsh*, 715 F.2d 897 (5th Cir. 1983)	6, 7, 8
Brown & Williamson Tobacco Corp. v. *Engman*, 527 F.2d 1115 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976)	10
National Wildlife Federation v. *Hanson*, 859 F.2d 313 (4th Cir. 1988)	6
Oklahoma Operating Co. v. *Love*, 252 U.S. 331 (1920)	10
Orleans Audubon Society v. *Lee*, 742 F.2d 901 (5th Cir. 1984)	7
Reisman v. *Caplin*, 375 U.S. 440 (1964)	10, 11
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	7
Tull v. *United States*, 481 U.S. 412 (1987)	9
United States v. *Harriss*, 347 U.S. 612 (1954)	8
United States v. *Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975)	8
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)	2, 3
United States v. *Tull*, 769 F.2d 182 (4th Cir. 1985), rev'd, 481 U.S. 412 (1987)	8
Young, Ex parte, 209 U.S. 123 (1908)	10

Constitution, statutes and regulations:

U.S. Const.:	
Amend. V (Due Process Clause)	8
Amend. VII	8
Clean Water Act, 33 U.S.C. 1251 *et seq.*:	
§ 101(a), 33 U.S.C. 1251(a)	2

Statutes and regulations—Continued: Page

§ 101(d), 33 U.S.C. 1251(d) 2, 5
§ 301, 33 U.S.C. 1311 5
§ 301(a), 33 U.S.C. 1311(a) 2, 4, 9
§ 309, 33 U.S.C. 1319 ..... 2, 5
§ 309(a), 33 U.S.C. 1319(a) 5
§ 309(a)(3), 33 U.S.C. 1319(a)(3) 2, 3
§ 309(b), 33 U.S.C. 1319(b) 2
§ 309(c)(1), 33 U.S.C. 1319(c)(1) 9
§ 309(c)(2), 33 U.S.C. 1319(c)(2) 9
§ 309(d), 33 U.S.C. 1319(d) 9, 10
§ 318, 33 U.S.C. 1328 7
§ 402, 33 U.S.C. 1342 7
§ 404, 33 U.S.C. 1344 ..... 2, 5, 7
§ 404(a), 33 U.S.C. 1344(a) 2
§ 404(d), 33 U.S.C. 1344(d) 2
§ 404(n), 33 U.S.C. 1344(n) 3, 6
§ 502(6), 33 U.S.C. 1362(6) 2
§ 502(7), 33 U.S.C. 1362(7) 2
§ 502(12), 33 U.S.C. 1362(12) 2
33 C.F.R.:
Section 325.9(b) 6
Section 328.3(a)(7) 3
Section 328.3(b) 3
Section 328.3(c) 3
40 C.F.R.:
Section 230.3(b) 3
Section 230.3(s)(7) 3
Section 230.3(t) 3

Miscellaneous:

43 Op. Att'y Gen. No. 15 (Sept. 5, 1979) 3, 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is unreported, but the judgment is noted at 947 F.2d 941 (Table). The opinions of the district court (Pet. App. 16a-20a, 55a-81a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1991. A timely petition for rehearing was denied on December 11, 1991. Pet. App. 95a-96a. The petition for a writ of certiorari was filed on March 6, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act (the Act) is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a), 33 U.S.C. 1251(a). Section 301(a) of the Act, 33 U.S.C. 1311(a), provides that "the discharge of any pollutant by any person shall be unlawful," unless authorized by a permit issued by the Army Corps of Engineers pursuant to Section 404, 33 U.S.C. 1344. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). The definitional section of the Act, in turn, defines "pollutant" to include any dredged or fill material, Section 502(6), 33 U.S.C. 1362(6), "discharge of a pollutant" to include "any addition of any pollutant to navigable waters," Section 502(12), 33 U.S.C. 1362(12), and "navigable waters" to mean "the waters of the United States," Section 502(7), 33 U.S.C. 1362(7).

Section 101(d) of the Act, 33 U.S.C. 1251(d), grants the Environmental Protection Agency (EPA) general responsibility for administering the Act, "[e]xcept as otherwise expressly provided." Section 309, 33 U.S.C. 1319, specifically authorizes EPA to issue orders requiring compliance with the Act whenever it determines that the Act has been violated, Section 309(a), 33 U.S.C. 1319(a), and to commence civil actions for appropriate relief, Section 309(b), 33 U.S.C. 1319(b). Finally, although Section 404 of the Act gives the Corps of Engineers the authority to issue permits for the discharge of dredged or fill material into covered waters, Section 404(a), 33 U.S.C. 1344(a),[1] it does not condition EPA's enforcement authority over illegal discharges of such materials upon

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[1] Section 404(a) on its face refers to the "Secretary," but Section 404(d) defines the term "Secretary" to mean "the Secretary of the Army, acting through the Chief of Engineers." 33 U.S.C. 1344(d).

prior action by the Corps. See Section 404(n), 33 U.S.C. 1344(n) ("Nothing in this section shall be construed to limit the authority of the Administrator [of EPA] to take action pursuant to section 1319 of this title."); Section 309(a)(3), 33 U.S.C. 1319 (a)(3) (describing EPA's enforcement authority without reference to Corps action regarding a permit).

Both EPA and the Corps[2] have promulgated substantially identical regulations that define "waters of the United States" to include "[w]etlands adjacent to" navigable waters. 40 C.F.R. 230.3(s)(7); 33 C.F.R. 328.3(a)(7).[3] Both agencies' regulations define "adjacent" to mean "bordering, contiguous, or neighboring," and state that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are 'adjacent wetlands.' " 40 C.F.R. 230.3(b); 33 C.F.R. 328.3(c).

2. Petitioners own 206 acres of land in Gloucester County, Virginia, near the Ware River. Without applying for a permit from the Corps of Engineers, petitioners cleared, drained, and constructed roads on approximately

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[2] Based on EPA's general responsibility for implementing the Act, the Attorney General has determined that the "ultimate administrative authority to determine the reach of the 'navigable waters' for the purposes of § 404" resides with EPA. 43 Op. Att'y Gen. No. 15, at 1 (Sept. 5, 1979).

[3] The term "wetlands" is defined to mean

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

40 C.F.R. 230.3(t); see 33 C.F.R. 328.3(b). The Court upheld the inclusion of wetlands in the definition of "navigable waters" in *Riverside Bayview Homes*, 474 U.S. at 129-139.

50 acres of the land, and in the process discharged dredged or fill material onto the land. In 1988, an official of the Fish and Wildlife Service of the Department of the Interior advised petitioners that they might have discharged fill onto wetlands in violation of the Act. Subsequently, an official of the Corps of Engineers inspected the property, but did not make a determination as to its status as wetlands. Instead, the Corps district office referred the matter to the Regional Office of EPA. On March 23, 1989, EPA issued an administrative order finding that petitioners' activities had violated the Act. Pet. App. 4a-5a, 29a, 97a-99a (jury verdict form); C.A. App. 337-338, 931-938.

3. Petitioners filed this action in the United States District Court for the Eastern District of Virginia, challenging the administrative order. The United States filed a counterclaim on June 23, 1989, charging petitioners with violating Section 301(a) of the Act and with failure to comply with the administrative order. After the court dismissed petitioners' challenge to the administrative order for lack of subject-matter jurisdiction, the case proceeded to trial on the government's counterclaim. After trial, the jury found that petitioners' property was a wetland adjacent to waters of the United States and that petitioners had discharged pollutants onto the wetland. Pet. App. 97a-99a (jury verdict form). After a three-day trial on remedial issues, the district court issued an order (*id.* at 16a-20a) requiring petitioners to allow certain parts of the property to revegetate, conditioning further changes to the property on the issuance of permits, and assessing a total of $300 in civil penalties.

In response to post-trial motions filed by petitioners, the district court issued an opinion (Pet. App. 55a-81a) rejecting petitioners' claims that (1) EPA had no authority to enforce the Act (*id.* at 59a-60a); (2) the regulatory

definition of "adjacent" was void for vagueness (*id.* at 64a-65a); (3) the judge improperly instructed the jury regarding the definition of wetlands (*id.* at 65a-67a); and (4) petitioners should have been allowed to present evidence to the jury regarding their good faith (*id.* at 71a-72a).

4. The court of appeals affirmed (Pet. App. 1a-14a). The court explained that Section 309(a) of the Act plainly authorizes EPA to commence actions challenging discharges of fill into wetlands made without a permit. Pet. App. 7a-8a. It also concluded that the district court properly instructed the jury on the meaning of the term "wetlands," *id.* at 10a-11a, and that the jury's finding that petitioners' property constituted wetlands was not clearly erroneous, *id.* at 11a. It noted that petitioners' contention that the "statute is void for vagueness is without merit." *Ibid.* Finally, it rejected petitioners' contention that due process required the judge to permit petitioners to introduce evidence regarding their good-faith belief that the administrative order was invalid, noting that "good faith is not a defense" to a violation of the Act. *Id.* at 11a-13a.

ARGUMENT

1. Petitioners plainly err in contending (Pet. 10-18) that EPA did not have the authority to commence this action enforcing the Act. As discussed above, Section 101(d) grants EPA general responsibility for administering the Act, and Section 309 expressly grants EPA the power to commence civil actions whenever it determines the Act has been violated. Because Section 301 provides that any discharge of pollutants into wetlands violates the Act if it is made without a permit, and because petitioners admittedly neither sought nor received a permit, this case falls within the core of EPA's enforcement authority under Section 309. The suggestion that the

provisions of Section 404 that grant permitting authority to the Corps of Engineers somehow implicitly deprive EPA of authority to commence actions challenging discharges made without permits is rebutted by the unambiguous language of the statute. See Section 404(n), 33 U.S.C. 1344(n) ("Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section [309].").

There can be no doubt that EPA in the course of administering the Act has authority independent from that of the Corps to determine whether particular lands are wetlands covered by the Act. See, *e.g.*, *National Wildlife Federation* v. *Hanson*, 859 F.2d 313, 316 (4th Cir. 1988) ("The EPA is ultimately responsible for the protection of wetlands."); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 903 n.12 (5th Cir. 1983) (noting that EPA and the Corps signed memorandum acknowledging EPA's independent authority to make wetlands determinations); 33 C.F.R. 325.9(b) (Corps' regulations recognizing EPA's independent authority); 43 Op. Att'y Gen. No. 15, at 6 (Sept. 5, 1979). In any event, contrary to petitioners' suggestions (Pet. 16, 17), it is clear that the Corps in this case never made any determination regarding the status of petitioners' property. As the court of appeals pointed out (Pet. App. 7a-8a), "nothing in the record suggests that the Corps actually refused to exert jurisdiction over the Hobbses [*sic*] property through a wetlands determination." Rather, the record showed that resource limitations induced the Corps district office to refer this matter to EPA without itself making any determination. C.A. App. 337-338, 931-938.

Petitioners' theory (Pet. 9) that the decision below "is in conflict with the decisions of other Circuits" is fanciful. Indeed, this appears to be the first and only reported

decision of a court of appeals addressing a challenge to EPA's independent authority to enforce the Act. The only case cited by petitioners that addresses the issue of EPA's authority specifically recognizes EPA's capacity to make wetlands determinations. See *Avoyelles Sportsmen's League, Inc.*, 715 F.2d at 903 n.12. The other case on which petitioners rely (Pet. 12 n.15, 14, 15 n.20), *Orleans Audubon Society* v. *Lee*, 742 F.2d 901 (5th Cir. 1984), stands only for the proposition that a court reviewing a Corps of Engineers determination under Section 404 should not substitute its judgment for that of the agency, a proposition that hardly suggests that EPA is barred from enforcing the Act where the Corps has made no determination. See *id.* at 906-907.[4]

2. Petitioners next contend (Pet. 18-21) that the lower courts erred in determining that petitioners' property constituted wetlands adjacent to waters of the United States. Because the jury found that petitioners' property did constitute wetlands, and because the court of appeals did not overturn that factual finding, this claim does not present an issue meriting this Court's review. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985). In any event, the finding was correct. As the court of appeals noted (Pet. App. 11a), expert testimony established that "there was both a ground and surface water connection between [petitioners'] property

[4] Petitioners err (Pet. 10) in stating that the court of appeals held that EPA has authority to issue permits under Section 404 of the Act. EPA's authority with respect to Section 404 permits was not at issue in this case. The court's aside that "EPA would not be much of an authority" if it could "issue permits, but could not enforce the very rule for which those permits provide the exception" (Pet. App. 8a), evidently refers to EPA's unquestioned authority to issue permits under other parts of the Act, such as Sections 318 and 402, 33 U.S.C. 1328, 1342.

and the Ware River." This testimony was sufficient to support the jury's finding.[5]

3. Petitioners also contend (Pet. 21-24) that the regulatory definition of wetlands "adjacent" to navigable waters is unconstitutionally vague. The courts of appeals consistently have rejected vagueness challenges to the regulations defining the scope of the Act. *United States* v. *Tull*, 769 F.2d 182, 186 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *Avoyelles Sportsmen's League, Inc.*, 715 F.2d at 917; see *United States* v. *Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975). The regulatory definition of wetlands is sufficiently definite to give "a person of ordinary intelligence fair notice" of what conduct the Clean Water Act prohibits, *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). Moreover, a landowner can resolve any uncertainty over the existence or extent of wetlands on his property by applying for a permit or by seeking an advisory opinion from the Corps or EPA. See *Avoyelles Sportsmen's League, Inc.*, 715 F.2d at 917. Accordingly, this claim does not merit further review.

4. Petitioners' final contention (Pet. 24-30) is that the district court violated the Due Process Clause and the Seventh Amendment by failing to allow petitioners to

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[5] Petitioners err in suggesting (Pet. 18-20) that the jury's determination that their property constituted wetlands conflicts with a statement in the preamble to the Corps' regulation to the effect that the Corps and EPA "generally" decline to assert jurisdiction over "man-made, nontidal drainage ditches dug on dry land." Pet. 18. This policy would not apply in petitioners' case for the simple reason that petitioners' drainage ditches were not excavated on dry land. As the district court noted (Pet. App. 66a-67a), "[petitioners'] own witness, Mr. Rudy Nuttall, a life-long resident of the Ware Neck area, testified that the area was a swamp and that one needed rubber boots when on the [petitioners'] property because the area was extremely wet." See C.A. App. 1366-1367.

introduce evidence tending to establish that petitioners had a good-faith belief in the invalidity of EPA's administrative order, and by failing to instruct the jury that good faith was a defense to enforcement of the order. Because the district court did not impose any penalty for petitioners' failure to comply with the order, this claim does not appear to involve a substantial controversy. See Pet. App. 36a (statement of district court that the $100 penalty assessed against Phillip Hobbs was assessed for his participation in the filling of wetlands contrary to Section 301(a), $200 assessed against Paul Hobbs was based on wetlands destruction, and because some of the filling occurred after he had been put on notice by a Corps official that the property might be wetlands).

In any event, the district court's rulings are correct. First, the courts below properly recognized that good faith is not a defense to liability under the Act, either for filling without a permit or for failure to comply with an administrative order. Pet. App. 12a, 71a. Section 309(d) of the Act creates a strict-liability standard by providing that any person who violates an administrative order "shall be subject to a civil penalty." 33 U.S.C. 1319(d); compare Section 309(c)(1) and (2), 33 U.S.C. 1319(c)(1) and (2) (imposing criminal liability for certain "negligent" and "knowing" violations of the Act). Section 309(d) then specifies that the court, "[i]n determining the amount of a civil penalty[,]" shall consider a list of factors, such as "good-faith efforts to comply * * * and such other matters as justice may require." Thus, Section 309(d) makes a defendant's good faith relevant only to the determination of the amount of civil penalties, not to the threshold assessment of liability. Hence, it does not have to be considered by a jury. See *Tull* v. *United States*, 481 U.S. 412, 425-427 (1987) (civil penalties under the Act need not be determined by a jury). Accordingly, because good faith is not relevant to the issues before the jury, the

Constitution did not require the district court either to allow petitioners to introduce evidence regarding their good faith, or to instruct the jury that good faith was a defense.[6]

Petitioners err in suggesting that the absence of a good-faith defense makes the Act unconstitutional because "the penalties for disobedience are by fines so enormous . . . as to intimidate [an affected party] from resorting to the Courts to test the validity of the legislation." Pet. 27 (quoting *Ex parte Young*, 209 U.S. 123, 147 (1908)). Under Section 309(d), no penalties can be imposed until the violator has had an opportunity to be heard in district court on the merits of the administrative order, under a statutory process that expressly directs the district judge to consider the violator's good faith in assessing the amount of the penalties. See *Brown & Williamson Tobacco Corp.* v. *Engman*, 527 F.2d 1115, 1121 (2d Cir. 1975) (rejecting challenge to penalty scheme that allowed court to consider good faith of the violator), cert. denied, 426 U.S. 911 (1976); compare *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331, 334-335 (1920) (invalidating scheme that did not provide for an opportunity to challenge the validity of a statute before enforcement of penalties). Petitioners cite no case finding the Act's procedures to violate due process. These procedures compare favorably with the procedures upheld in *Reisman* v. *Caplin*, 375 U.S. 440, 446-450 (1964) (upholding IRS subpoenas that subjected recipients to fines for noncompliance, because fines would be assessed by a court, which would consider recipients' good faith in

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[6] We note that the district court fully took into account petitioners' contentions of good faith in determining the amount of the civil penalties. See Pet. App. 34a-35a.

refusing to comply).[7] Also, because the district court in fact assessed no penalties on petitioners for their failure to comply with the administrative order, this case is a particularly poor vehicle for evaluation of such a claim. Accordingly, this claim does not merit review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1992

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[7] Contrary to petitioners' assertion (Pet. 27), *Reisman* v. *Caplin* does not suggest that a defendant is entitled to have a jury consider its good faith. See 375 U.S. at 449 (recipient of subpoena may challenge it "before either the district judge or United States Commissioner").